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HOME INSURANCE COMPANY, **PLAINTIFF,** **v.** **CORNELL-DUBILIER ELECTRONICS, INC., ET AL.,** **DEFENDANTS.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: MERCER COUNTY** Civil Action Docket No. MER-L-5192-96
CORNELL-DUBILIER ELECTRONICS, INC., ET AL., **PLAINTIFFS,** **v.** **UNITED INSURANCE COMPANY,** **DEFENDANT.**	Civil Action Docket No. MER-L-2773-02
CORNELL-DUBILIER ELECTRONICS, INC., ET AL., **PLAINTIFFS,** **v.** **COLUMBIA CASUALTY COMPANY, ET AL.,** **DEFENDANTS.**	Civil Action Docket No. MER-L-463-05

MEMORANDUM OF CORNELL-DUBILIER ELECTRONICS, INC. IN SUPPORT OF ITS MOTION IN LIMINE TO PRECLUDE EVIDENCE AS TO ISSUES PREVIOUSLY DECIDED BY THIS COURT

Introduction

Exxon Mobil Corporation ("Exxon"), acting as the indemnitor to Certain London Market Insurers ("Lloyds"), recently served expert reports that make clear its intent to re-litigate coverage issues that this Court has already expressly decided against Lloyds. Specifically, the expert reports served by Exxon attempt to stake out the positions that (1) Cornell-Dubilier Electronics, Inc. ("CDE") expected and intended the harm at the South Plainfield and Dismal Swamp Sites and (2) CDE's claims for coverage at those two New Jersey sites are barred by a pollution exclusion clause. Fundamental fairness dictates that Exxon and Lloyds be precluded from introducing evidence on these issues because this Court has already decided them in a March 4, 2004 Order on South Plainfield, issued after a full trial, and as to Dismal Swamp in a March 19, 2007 Order granting summary judgment to CDE on the issue of coverage. On both occasions, Lloyds unsuccessfully advanced precisely the arguments Exxon now attempts based on policy provisions that were identical with or functionally the same as the ones in the Exxon Policies.

The expert evidence Exxon seeks to present now is no more persuasive than the original evidence that Lloyds originally presented; however, it would turn upside down any concept of fairness if Lloyds, having been sanctioned for failing to produce the Exxon Policies were now permitted, through its indemnitor, to benefit from its misconduct by being given a second chance to present new evidence on the very coverage issues that have already been decided against it.[1] This Court has found that Lloyds' misconduct caused prejudice to CDE. Lloyds should not be allowed to exacerbate that prejudice by subjecting CDE to the burden of obtaining experts,

[1] Although Exxon may believe that Lloyds did not do an adequate job in presenting the issues to the Court at the South Plainfield trial and the Dismal Swamp summary judgment proceeding, that is not an argument for letting Exxon re-litigate those issues against CDE many years later. Rather, it is an argument for why Exxon should not be required to indemnify Lloyds, which can be raised when the indemnification claims are tried before this Court.

conducting expert discovery, and re-trying issues that have already been adjudicated by the Court. This case is in its sixteenth year; there have already been exhaustive coverage proceedings with respect to South Plainfield and Dismal Swamp in which Lloyds participated fully. Neither the Court nor CDE should be forced to re-try issues that have already been decided in this case, particularly with evidence that was available to Lloyds when Lloyds litigated the issues the first time.

The resolution of this motion *in limine* at this point in the case will assist both the parties and the Court. As a practical matter, no meaningful progress can be made on settlement until the parties know the scope of what remains to be decided and whether Exxon will be permitted to re-litigate issues already resolved against Lloyds.

Argument

Like it or not, Exxon, as Lloyds' indemnitor, is stuck in Lloyds' uncomfortable shoes and is bound by the issues that have been decided against Lloyds. The provisions in the Exxon Policies that Exxon seeks to re-litigate are identical with or materially the same as the provisions in other Lloyds policies which have been the subject of specific rulings in this case as to South Plainfield and Dismal Swamp. Lloyds, acting through Exxon, is precluded from re-trying the issues it has already lost. In situations such as this, where it appears that one party will needlessly waste the resources of the Court and the other parties by litigating matters unnecessarily, the Court may grant a motion *in limine* to "foster judicial economy" and "avoid unnecessary expense and delay." *Sculler v. Sculler*, 348 N.J. Super. 374, 377 (Ch. Div. 2001) (finding that a motion *in limine* is an appropriate means to clarify the relative burdens of the parties in advance of a trial).

I. This Court Has Already Found that CDE's Claims for South Plainfield and Dismal Swamp Are Not Barred by "Expected or Intended" or "Pollution Exclusion" Policy Terms.

Shortly before the South Plainfield trial in February of 2004, Lloyds, together with several other insurers, filed a brief in opposition to CDE's summary judgment motion and in support of their cross-motion for summary judgment. That brief set out the different occurrence and pollution exclusion provisions in the various policies. Some of the policies contained the so-called "sudden and accidental" pollution exclusion; and some of the policies, including policies issued by Lloyds, "contain[ed] the Industries Seepage Pollution and Contamination Clause No. 3 (referred to as "NMA 1685')". (Sanoff Cert., Exh. A at 24.) Lloyds went on to argue that the New Jersey Supreme Court's decision in *Morton Int'l v. Gen Accident Ins. Co.*, 134 N.J. 1 (1993), provided the test for determining whether these various pollution exclusion provisions defeated coverage for the South Plainfield Site: "The policyholders are correct in stating that, under New Jersey law, a pollution exclusion will apply only when an insured intentionally discharges a known pollutant and that, absent exceptional circumstances, the subjective knowledge of the insured must be examined in order [to] determine whether that insured 'expected or intended' the ultimate harm. See Morton, 134 N.J. at 78". (Sanoff Cert., Exh. A at 53.) In support of their position that CDE intentionally discharged a known pollutant, Lloyds relied upon expert testimony from Phillip Wagner: "it is Dr. Wagner's opinion that CDE was affirmatively aware that organic chemicals such as PCB and TCE were known to be environmental pollutants in the early 1940s". (Sanoff Cert., Exh. A at 56.)

After the Court denied the cross-motions for summary judgment, CDE and Lloyds presented their respective evidence at the South Plainfield trial. Lloyds' case consisted entirely of expert testimony, most extensively the testimony of Dr. Wagner, who identified the different

sources of contamination, including the dumping of capacitors and trichloroethylene ("TCE") in an on-site pit or landfill, the release of liquid waste through floor drains and sewage outfalls into the Bound Brook, and the heating of PCBs which caused them to become airborne:

> The three primary modes of release would be, first of all, the landfill, an open dump, whatever, the direct disposal of waste in the real property.
>
> The second would be through the squeegeeing of liquid wastes that had been spilled on the floor into floor drains and with some of the liquids going into – through cracks through the floor.
>
> In connection with that floor drains, in my opinions, it's likely they were connected to the drain system which then takes the waste to the [sewer] outfalls, which get the waste to Bound Brook....
>
> A fourth mechanism would be through the volatilization of particularly the PCBs inside the building....

(Sanoff Cert., Exh. B at 485.) Dr. Wagner went on to offer the view that CDE knew that PCBs and TCE were hazardous pollutants and intentionally disposed of them expecting to cause contamination:

> Q. Dr Wagner, do you have an opinion as to whether CDE expected harm to the South Plainfield site based on its disposal of the PCB and TCE.
>
> A. In my opinion, they did.
>
> Q. And why is that?
>
> ...
>
> A. I believe that first of all, they knew that these were hazardous chemicals, that they had the potential for being pollutant[s]. I believe they knew that the manner in which they were disposing of those wastes would likely seep in the ground so as to contaminate the soil.
>
> I believe they knew that there was groundwater in close proximity to the land surface and that it would be likely that the wastes would contaminate the groundwater.

(Sanoff Cert., Exh. B at 514-15.) Dr. Wagner also offered the view that the contamination at the South Plainfield facility might have been in violation of state laws relating to disposal of wastes into sewers. (*See* Sanoff Cert., Exh. B at 516-17.)[2]

After hearing Lloyds' evidence at trial, Judge Sabatino issued the Court's decision from the bench. Noting that all of the Lloyds policies contained "language not atypical of CGL policies during the relevant time frame, which excluded damage that was, quote, expected or intended, closed quote, by the insured", the Court went on to consider whether CDE had expected or intended the contamination under the factors specified in *Morton International v. General Accident*, 134 N.J. 1 (1993).[3] (Sanoff Cert., Exh. C at 743.)

In applying the *Morton* factors, the Court initially found that there had been multiple sources of contamination – the dumping in the pit in the back of the property, discharge of liquid wastes into drains and sewage pipes, and airborne PCBs and that some of the disposal had been intentional but without "an intention to deliberately cause these materials to escape into the environment." (Sanoff Cert., Exh. C at 749-52.) The Court went on to consider the *Morton* factor as to whether the disposal had violated any laws and whether there had been any governmental efforts to stop the discharge of pollutants:

> The third factor under Morton that the Court will turn to is whether or not the regulatory authority had attempted to discourage or prevent the conduct in question. There is no proof of this whatsoever. In fact at the summary judgment arguments,

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[2] In its summary judgment papers, Lloyds argued that there were regulations on the books governing the disposal of organic chemicals, including New Jersey's Spill Compensation and Control Act. (*See* Sanoff Cert., Exh. A at 44 n.18.)

[3] In applying the factors from *Morton,* Judge Sabatino was not simply evaluating the issue of the expected and intended as it applied to the existence of an occurrence; he was also evaluating the pollution exclusion issue. Indeed, the New Jersey Supreme Court in *Morton* expressly declined to enforce pollution exclusions as written in New Jersey and instead developed a set of factors based on the expected and intended standard on which to determine whether to enforce a pollution exclusion provision. *See Morton*, 134 N.J. at 80-91.

> defendants did not attempt to make that demonstration because they could not.

(Sanoff Cert., Exh. C at 753.) As the Court explained, the government did not try to halt the flow of PCBs and TCE from the South Plainfield facility because "government regulatory standards for the discharge of polychlorinated biphenyls in the United States did not arise until in or about 1976, and for trichloroethylene specifically until the early 1980s." (Sanoff Cert., Exh. C at 754.)

After discussing Dr. Wagner's credibility and testimony, Judge Sabatino found:

> Looking at the totality of circumstances and all of the Morton factors, the Court finds that, on balance, the defendants have failed to show by a preponderance of the evidence that – the Morton test that has been established here, that CDE and/or FPE expected or intended environmental harm from TCE or PCBs at this site prior to the 1962 closure of the plant.
>
> And the Court makes this finding notwithstanding 26 years of discharge with included intentional burial of the capacitors at the site.

(Sanoff Cert., Exh. C at 774.) The Court followed up its bench decision with a written Order, dated March 4, 2004. That Order contained express findings that Lloyds and the other insurers had failed to carry their burden that coverage was barred either because of expected or intended harm or any pollution exclusion provision:

> b. With respect to the south Plainfield site only, the Court finds that the Insurers failed to meet their burden of showing that the Policyholders expected or intended harm;
>
> c. The Court finds that the Insurers failed to meet their burden of showing that coverage is barred by the pollution exclusion clauses in those of the Policies which contain such clauses.

(Sanoff Certification, Exh. D at 2.)[4]

Exxon's expert reports are nothing more than an exercise in *déjà vu.*[5] Even a cursory review of the expert reports which Exxon recently served indicates that Exxon on behalf of Lloyds plans to proceed as if there had been no prior trial on South Plainfield and to simply present again the issue whether CDE's claims are barred by expected or intended contamination or a pollution exclusion clause. Indeed, Exxon's expert report from Robert M. Zoch, Jr. in large measure follows the precise script of Dr. Wagner's testimony. For example, where Dr. Wagner testified that there were multiple sources of contamination arising from CDE's South Plainfield operations, Mr. Zoch's report offers the same opinion: "Opinion No. 1 – The CDE South Plainfield production plant and its surroundings were contaminated by industrial wastes consisting of liquid and airborne releases from plant operations and by the on-site dumping of process wastes and rejected capacitors." (Sanoff Cert., Exh. H at 14.) Likewise, where Dr. Wagner testified that CDE expected the contamination from disposal of liquid waste into floor drains and sewer outfalls that emptied into the Bound Brook, Mr. Zoch's report looks to follow suit exactly: "Opinion No. 2 – Discharges of sewage wastes and industrial process wastewater which resulted in the contamination of Bound Brook were intended and expected by CDE." (Sanoff Cert., Exh. H at 16.) Finally, Mr. Zoch will opine the same as Dr Wagner that CDE expected contamination to result from disposal into the open pit at the site: "Opinion No. 3 –

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[4] On summary judgment several years later, this Court found that coverage under the various policies issued by Lloyds also existed for the Dismal Swamp Site. (*See* Sanoff Cert., Exhs. E ("Order Granting Summary Judgment in Favor of the Policyholders on the Issue of Coverage for the Dismal Swamp Site") and F (portions of the March 16, 2007 transcript containing the Court's decision).)

[5] Exxon identified three experts: (1) John Richard Ludbrooke Youell, an expert underwriter who offers interpretation of certain provisions in the Exxon Policies, including the various pollution exclusion and the named insured provisions, (2) Robert M. Zoch, Jr., an environmental consultant who offers opinions about the sources of contamination at the South Plainfield and Venice Sites and whether CDE expected and intended that contamination while it operated those sites, and (3) Wayne M. Gripp, an aerial photography expert who offers opinions about the interpretation of aerial photographs of the South Plainfield site from 1940-2002. (*See* Sanoff Cert., Exhs. G-I.)

On-Site burning and dumping of rejected capacitors and component parts were intended and expected by CDE and were in violation of New Jersey solid waste regulations." (Sanoff Cert., Exh. H at 20.)

While the experts that Exxon proposes to use are different and some of the documentary evidence may be different, such as historical records from local and county boards from the 1940s, Exxon's tactic is brazenly to try to get this Court to reach a different conclusion on the issues of expected and intended and pollution exclusion than the conclusions memorialized in this Court's March 4, 2004 Order. That tactic is plainly improper. Lloyds had a full and complete opportunity in 2004 to present all of the evidence it thought relevant on the issues of whether CDE expected or intended contamination. Based on that evidence, the Court made detailed findings about CDE's historical operations and concluded that CDE did not expect or intend contamination and CDE's claims were not barred by pollution exclusion provisions in any of the policies. It would be grossly unfair to CDE to permit Lloyds, through its indemnitor, to have a second chance to present different evidence and experts on the previously decided subjects with the hindsight of knowing how CDE put on its case and how the Court ruled the first time. Exxon can have no greater rights than Lloyds and should be bound by the evidence Lloyds put on at the 2004 trial as to CDE's historical operations and what CDE knew and expected during the period that it operated the South Plainfield facility. *See Hess v. Hess*, 117 N.Y. 306, 309 (N.Y. 1889) ("The defendants, as his indemnitors, stand in his shoes"); *cf.*, *Cacioppo v. Boeing Co.*, 153 N.J. Super. 355, 361 (Law Div. 1977) ("[T]he rights of the subrogee 'arise no higher than those of the subrogor'..."); *Breen v. N.J. Mfrs. Indem. Ins. Co.*, 105 N.J. Super. 302, 308 (Law Div. 1969) ("It is a well-established rule in New Jersey that the rights of a judgment

creditor of an insured under a policy of indemnity insurance on an automobile are purely derivative, and the judgment creditor stands in the shoes of the insured").

II. The Provisions in the Exxon Policies as to "Expected or Intended" and "Pollution Exclusion" Are Not Materially Different than the Provisions in Policies Under Which Coverage Has Already Been Found.

For the past year, Exxon has conducted what Lloyds characterized as "scorched earth" discovery[6] – all in a desperate effort to find any evidence to support its known loss defense. As Exxon advised the Court recently, that discovery, notwithstanding its review of over a half million pages of documents, failed to elicit any support for that defense.[7] Unable to find support for a known loss defense, it is not surprising that Exxon would try to shift its focus and pivot back to re-litigating the issues of the "expected and intended" and "pollution exclusion" clauses. In an effort to evade the prior rulings of this Court on these subjects, Exxon will no doubt contend that it is entitled to re-try these issues because the Exxon Policies are manuscript policies which use wording that is not the same as form policies. Such a contention is demonstrably untrue. Nor does it justify Exxon's attempt to put in new factual evidence about CDE's historical operations at South Plainfield, particularly evidence which was available to Lloyds in 2004. While the Exxon Policies may be manuscript policies, they used "expected and intended" and "pollution exclusion" provisions that were identical with or functionally the same

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[6] In its August 10, 2011 "Objections to the Special Master's Decision Regarding Cornell-Dubilier Electronic, Inc.'s Motion to Enforce the Sanctions Order on Attorneys' Fees", Lloyds wrote that Exxon was engaged in "scorched earth" discovery that was causing CDE to "incur hundreds of thousands of dollars in fees and expenses to respond to discovery and attending depositions which relate to Exxon's limited defenses as set forth in the Court's October 14, 2010 rulings." (*See* Sanoff Cert., Exh J at 4.)

[7] In its October 18, 2011 Brief in Support of its Motion to Compel Discovery, Exxon admitted that although it had "reviewed in excess of 500,000 pages of documents . . . none of these documents demonstrate that CDE contemplated the South Plainfield site as a potential PCB problem in 1982." (Sanoff Cert., Exh. K at 12 n.2.) At oral argument on December 2, 2011, Exxon's counsel likewise conceded that except for a single privileged document (which did not really help Exxon's case), "there is nothing else that we have seen that says, yes, we recognized in October 1982 that we had a potential problem at South Plainfield." (Sanoff Cert., Exh. L at 33-34.)

as the provisions in the policies which were the subject of Judge Sabatino's March 4, 2004 Order.

A. The "Occurrence" Language in The Exxon Policies Is Not Meaningfully Different than the "Occurrence" Language in the Policies Subject to the Court's Previous Rulings.

The "occurrence" language of the Exxon Policies, including the expected or intended limitation, is similar in all material respects to the language in the Lloyds policies that were the subject of the 2004 South Plainfield and 2007 Dismal Swamp decisions. Lloyds Policy, No. 614/NC5608 (the "1979 Lloyds Policy"), which was subject to both decisions, follows form to the occurrence provision in the underlying umbrella policy issued by Wrenford Insurance Company:

> "Occurrence" means an accident, including a continuous or repeated exposure to conditions, which results, during the policy period, in a personal injury, property damage or advertising liability neither expected nor intended from the standpoint of the insured . . . .

(Sanoff Cert., Exhs. M at CORNELL 003721, 003724 (noting that the 1979 Lloyds Policy follows form to the underlying policy number B49027 issued by Wrenford Insurance Co. Ltd.); N at 3 (containing the underlying policy language).) The Exxon Policies use virtually the same definition:

> With respect to Property Damage, including loss of use thereof, the words "Loss Occurrence" shall specifically include:
>
> (i) an accident, which term includes injury to or destruction of property as the unforeseen result of an intentional act happening during the policy period or
>
> (ii) a continuous or repeated exposure to conditions which unexpectedly or unintentionally causes injury to or destruction of property during the policy period. . . .

(Sanoff Cert., Exh. O at LDN 310,584 EXXON 03808.)[8] A "Loss Occurrence" is established under the Exxon Policies whenever there is "a continuous or repeated exposure to conditions", which causes injury unexpectedly or unintentionally. It follows that by finding that there was an occurrence under the 1979 Lloyds Policy with respect to the South Plainfield Site, the Court in 2004 necessarily found that the elements of the definition of a Loss Occurrence under the Exxon Policies also were satisfied.[9]

B. The Pollution Exclusion in the Exxon Policies Is Not Meaningfully Different than the Pollution Exclusion in the Policies Subject to the Court's Previous Rulings.

As was the case with "expected and intended" provisions in the Exxon Policies, Exxon cannot credibly argue that the specific wording of pollution exclusions in the Exxon Policies provides a basis for re-trying that issue as to the South Plainfield and Dismal Swamp Sites. No matter how much Exxon may attempt to distinguish Judge Sabatino's 2004 decision on South Plainfield Site, Exxon, standing in Lloyds' shoes, is bound by that decision, the subsequent March 4, 2004 Order, and the Court's 2007 decision as to the Dismal Swamp Site for the simple reason that the pollution exclusion provisions in the Exxon Policies are either identical with or functionally the same as the pollution exclusion provision in the 1979 Lloyds Policy, which was expressly subject to the March 4, 2004 Order with respect to the South Plainfield Site and the March 19, 2007 Order with respect to the Dismal Swamp Site.

In its 2004 summary judgment papers, Lloyds explained that its 1979 Policy (as well as several other of its policies in this case) used a standard pollution exclusion form – Seepage

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[8] The definition of "Property Damage" is identical in the 1979 Lloyds Policy and the Exxon Policies. (*Compare*, Exh. N at 5 to Exh. O at LDN 310,584 EXXON 03808-09.)

[9] In connection with the Dismal Swamp summary judgment proceeding, Judge Jacobson likewise found that there was an occurrence within the meaning of the 1979 Lloyds Policy. Judge Jacobson in reaching that conclusion noted that New Jersey decisions recognized that minor wording differences in the definition of "occurrence" did not alter the underlying concept of when harm could be deemed to be expected and intended. (Sanoff Cert., Exh., F at 60-67.)

Pollution and Contamination Clause No. 3, referred to as NMA 1685. That form NMA 1685 states that coverage is excluded for:

> (1) Personal Injury or Bodily Injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination, provided always that this paragraph (1) shall not apply to liability for Personal Injury or Bodily Injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed, where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.

(Sanoff Cert., Exh. M at CORNELL 003719.) Importantly, the Exxon Policies with attachment points above $110 million contain this same form NMA 1685 Seepage, Pollution and Contamination Clause. (Sanoff Cert., Exh. P at LDN 310,584 EXXON 04511.) Because Judge Sabatino ruled that there was no basis for excluding coverage for the South Plainfield Site under the NMA 1685 pollution exclusion in the 1979 Lloyds Policy, the same is necessarily true with respect to the identical pollution exclusion form NMA 1685 in the Exxon Policies.

Nor can it be argued that the Seepage, Pollution, and Contamination exclusion in the Exxon Policies with attachment points below $110 million operates to bar coverage for the South Plainfield site. The pollution exclusion provisions in the Exxon Policies below $110 million are based on the form NMA 1685 Seepage, Pollution, and Contamination clause except that the provision was modified in two key respects that made it far less restrictive of coverage. The provision, as modified, provides that there would be no coverage for

> (3) Claims resulting directly or indirectly from any seepage, pollution or contamination if such seepage, pollution or contamination
> (1) results directly from any known violation of any governmental statute, regulation, ordinance or law applicable thereto, (2) is intended or expected from the standpoint of the

> Insured or any other person or organization acting for or on behalf of the Insured

(Sanoff Cert., Exh. O at LDN 310,584 EXXON 03819.) The first modification was to take out the word "sudden" which favors the policyholder because the exclusion, as modified, applies where the seepage, pollution, and contamination is unexpected and unintended regardless of whether it is caused by a "sudden" happening. The second modification is even more favorable to the policyholder because it imposes an additional prerequisite for the application of the exclusion. Under the operative clause in the Exxon Policies with attachment points below $110 million, coverage for a seepage, pollution, and contamination claim is excluded only if, in addition to the environmental harm being expected or intended, it also results from a violation of law known to the policyholder. Exxon offered a clear explanation of this provision over a decade ago in its Trial Brief in the California Coverage Action, *Exxon Corp. v. Ins. Corp. of N. Am.*, No. 971376 (CA. Super. Ct.):

> The clear reading of the [the seepage, pollution and contamination] provision suggests that subpart (1) (regarding known violation), and subpart (2) (regarding expected or intended), are conjunctively jointed, and thus, must be read as precluding damage which "results directly from any known violation...*and,* (2) is intended or expected from the standpoint of the insured..."

(Sanoff Cert., Exh. Q at EXXONINDEM 00001077.) Exxon has taken that position not only in the California case but in this case as well. Exxon's Rule 4:14 designee, Arthur Lowry, admitted that the seepage, pollution and contamination exclusion in the Exxon Policies only applies where the insurer has shown a known violation of law:

> Q ... So in order for the exclusion to apply, there has to be a known violation involved?
>
> A. Yes, we're agreeing on that.

(Sanoff Cert. Exh. R at 121.) Because the Court has found that the pollution exclusion provision in the 1979 Lloyds Policy does not bar coverage, it follows *a fortiori* that the pollution exclusion provisions in the Exxon Polices likewise cannot bar coverage.

Even if the pollution exclusions in the Exxon Policies were not identical to or functionally the same as the provisions in the 1979 Lloyds Policy, application of the pollution exclusions in the Exxon Policies would still be precluded by the Court's prior rulings on South Plainfield and Dismal Swamp. In its 2004 summary judgment papers, Lloyds conceded that "under New Jersey law, a pollution exclusion will apply only when an insured intentionally discharges a known pollutant and that, absent exceptional circumstances, the subjective knowledge of the insured must be examined in order [to] determine whether that insured 'expected or intended' the ultimate harm. See Morton, 134 N.J. at 78". (Sanoff Cert., Exh. A at 53.) As Lloyds acknowledged, New Jersey courts apply a single test to determine whether any pollution exclusion bars coverage – a test which looks to whether there was an intentional discharge of a known pollutant. In accordance with what both CDE and Lloyds urged in their summary judgment papers, Judge Sabatino applied the *Morton* test and found that none of the different pollution exclusions in the case barred coverage. (*See* Sanoff Cert., Exh. C.) Because Judge Sabatino concluded that CDE's operations could not satisfy the *Morton* test, that conclusion necessarily defeats the pollution exclusions in the Exxon Policies.

This case was filed in 1996 – almost sixteen years ago. After a decade of improper delay, Lloyds finally disclosed the existence of the Exxon Policies in 2008, right on the eve of a scheduled allocation trial which would finally have brought this case close to resolution. Lloyds has had more than ample opportunity to present its case with respect to South Plainfield and Dismal Swamp. Lloyds, through its indemnitor Exxon, should not have the opportunity to try a

second time those issues from the South Plainfield coverage case which have already been decided against it. To allow Lloyds and Exxon a re-trial of these issues would effectively reward Lloyds for its misconduct and magnify the prejudice that CDE has already suffered by that misconduct. A re-trial would allow Lloyds, solely because of its sanctioned conduct, the enormous benefit of a second chance to put on its case with new experts and new documents after it has had the oportunity to watch its adversary's presentation and to hear how the Court evaluated that presentation.

Conclusion

For the foregoing reasons, CDE respectfully requests that the Court bar Exxon and Lloyds from re-litigating issues previously decided by the Court, including whether coverage for the South Plainfield or Dismal Swamp Sites is barred by an occurrence definition or a pollution exclusion clause in the Exxon Policies.

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